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IN THE

Supreme Court of the United States

October Term, 1966

No. 747

SHERIDAN CREATIONS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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For the first time in its entire existence the National Labor Relations Board has ordered, in this case, an employer to recognize and enter into a collective bargaining agreement with a union which did not represent the employer's employees, which was never certified as a bargaining representative and which did not lose its representative status through an employer unfair labor practice.

The Board in this case thus deprived employees of their right (29 U.S.C. Sec. 157) to be represented by a union of their own choice and at the same time ordered the employer to do what in all other circumstances he would be prohibited under the National Labor Relations Act (29 U.S.C. Sec. 158(a)) from doing. The majority decision in the court below not only failed to effectuate the policies of the Act, it violated them.

The government has tried to justify this fundamental departure from the policies of the Act by writing in its brief to this Court, at page 8:

> "Since petitioner had not properly withdrawn from the multi-employer unit, the question of the Union's representative status depends on whether it had the support of a majority of the employees in that unit."

Petitioner considers the above statement, which is unsupported by any citation, to be completely erroneous. It is a matter of undisputed fact that the union did not represent the employees of the petitioner. It is the petitioner who is charged with a failure to bargain, not the multi-employer association. It is irrelevant, as to the petitioner, that the union represented the employees of other employers.

No employer can confer "representative status" on a union for his employees by "not properly withdrawing" from a multi-employer unit. To hold otherwise would be to place in the hands of the employer the power to determine whether or not a union represented his employees. Under the government's view as expressed to this Court, an employer in a multi-employer unit has no duty under Section 8(a)(2) to cease recognizing a union which does not represent his employees. The government would permit the employer to ignore his employees' representational choice. This view is contrary to the policy of the National Labor Relations Act, and the policy of this Court as expressed in *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 366 U.S. 731, 738-739 (1961).

In order to reach its decision the majority of the Court of Appeals found it necessary to exceed its power and amend the National Labor Relations Act. The employer was found to have violated Section 8(a)(5) of the Act which reads:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the

representatives of his employees, subject to the provisions of section 159(a) of this title."

The majority below, without any citation of authority—either in cases or legislative history—wrote:

> "Respondent argues that it would be illegal for it to bargain after it knew that a majority of *its* employees had withdrawn. *'Its,'* however refers to the bargaining unit, once one has been established, rather than one employer of a multi-employer unit." (Pet. for cert., p. 4b) (Emphasis the Court's.)

The above interpretation is directly contrary to the clear meaning of the words. It amounts to an amendment of the Act.

Clearly, simply and concisely "its" does *not* refer to the bargaining unit. "Its" refers specifically to the employer's employees. The Act clearly requires that the union represent the employer's employees. It does not provide that an employer may choose to bargain with a union which does not represent his employees simply by deciding to remain in a multi-employer unit after his employees have notified him that the union does not represent them.

The Court's interpretation is doubly unwarranted because Congress re-examined the National Labor Relations Act in 1959, amended it in part (for example, see amendments to Section 8(b)(4) 29 U.S.C. 158), and left the language of Section 8(a)(5) unchanged. At the time of the Congressional re-examination the NLRB had decided that the conduct of the employer in this case was proper and legal (*Moscow Idaho Seed Co.*, 107 NLRB 107 (1953). In the instant case the NLRB reversed *Moscow Idaho Seed Co.* without any reference to it.

Conclusion

The petition for a writ of certiorari should be granted because the decision below is contrary to the policy of the National Labor Relations Act, is contrary to the policy expressed in decisions of this Court and of the Court of Appeals for the Second Circuit, is contrary to a prior decision of the NLRB, and is of significance in the developing law relating to the multi-employer situation.

Respectfully submitted,

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